



## **LIBRARY OF CONGRESS**

### **U.S. Copyright Office**

#### **37 CFR Part 210**

**[Docket No. 2020-8]**

### **Transparency of the Mechanical Licensing Collective and Its Database of Musical Works Information**

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Notification of inquiry.

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**SUMMARY:** The U.S. Copyright Office is issuing a notification of inquiry regarding the Musical Works Modernization Act, title I of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act. Title I establishes a blanket compulsory license, which digital music providers may obtain to make and deliver digital phonorecords of musical works. By statute, the blanket license, which will be administered by a mechanical licensing collective, will become available on January 1, 2021. The MMA specifically directs the Copyright Office to adopt a number of regulations to govern the new blanket licensing regime, including prescribing categories of information to be included in the mechanical licensing collective’s musical works database, as well as rules related to the usability, interoperability, and usage restrictions of the database. Congress has indicated that the Office should exercise its general regulatory authority to, among other things, help ensure that the collective’s policies and practices are transparent and accountable. The Office seeks public comment regarding the subjects of inquiry discussed in this notification, namely, issues related to ensuring appropriate transparency of the mechanical licensing collective itself, as well as the contents of the collective’s public musical work database,

database access, and database use. This notification is being published concurrently with a related notice of proposed rulemaking related to confidentiality considerations with respect to the operation and records of the collective.

**DATES:** Written comments must be received no later than 11:59 Eastern Time on [INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office website at <https://copyright.gov/rulemaking/mma-transparency>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at [regans@copyright.gov](mailto:regans@copyright.gov) or Anna Chauvet, Associate General Counsel, by email at [achau@copyright.gov](mailto:achau@copyright.gov). Each can be contacted by telephone by calling (202) 707-8350.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On October 11, 2018, the president signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, H.R. 1551 (“MMA”).<sup>1</sup> Title I of the MMA, the Musical Works Modernization Act, substantially modifies the compulsory “mechanical”

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<sup>1</sup> Pub. L. 115-264, 132 Stat. 3676 (2018).

license for making and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.<sup>2</sup> Prior to the MMA, licensees obtained a section 115 compulsory license on a per-work, song-by-song basis, by serving a notice of intention to obtain a compulsory license (“NOI”) on the relevant copyright owner (or filing it with the Copyright Office if the Office’s public records did not identify the copyright owner) and then paying applicable royalties accompanied by accounting statements.<sup>3</sup> The MMA amends this regime most significantly by establishing a new blanket compulsory license that digital music providers may obtain to make digital phonorecord deliveries (“DPDs”) of musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as “covered activity,” where such activity qualifies for a compulsory license).<sup>4</sup> Instead of licensing one song at a time by serving NOIs on individual copyright owners, the blanket license will cover all musical works available for compulsory licensing and will be centrally administered by a mechanical licensing collective (“MLC”), which has been designated by the Register of Copyrights.<sup>5</sup>

By statute, digital music providers will bear the reasonable costs of establishing and operating the MLC through an administrative assessment, to be determined, if

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<sup>2</sup> See S. Rep. No. 115-339, at 1–2 (2018); Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 1 (2018), [https://www.copyright.gov/legislation/mma\\_conference\\_report.pdf](https://www.copyright.gov/legislation/mma_conference_report.pdf) (“Conf. Rep.”); see also H.R. Rep. No. 115-651, at 2 (2018) (detailing the House Judiciary Committee’s efforts to review music copyright laws).

<sup>3</sup> See 17 U.S.C. 115(b)(1), (c)(5) (2017); U.S. Copyright Office, Copyright and the Music Marketplace 28–31 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (describing operation of prior section 115 license).

<sup>4</sup> 17 U.S.C. 115(d)(1), (e)(7); see H.R. Rep. No. 115-651, at 4–6 (describing operation of the blanket license and the mechanical licensing collective); S. Rep. No. 115-339, at 3–6 (same).

<sup>5</sup> 17 U.S.C. 115(d)(1), (3); 84 FR 32274 (July 8, 2019).

necessary, by the Copyright Royalty Judges (“CRJs”).<sup>6</sup> As permitted under the MMA, the Office designated a digital licensee coordinator (“DLC”) to represent licensees in proceedings before the CRJs and the Copyright Office, to serve as a non-voting member of the MLC, and to carry out other functions.<sup>7</sup>

#### **A. General Regulatory Background and Importance of Transparency**

The MMA enumerates several regulations that the Copyright Office is specifically directed to promulgate to govern the new blanket licensing regime, and Congress invested the Copyright Office with “broad regulatory authority”<sup>8</sup> to “conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of [the MMA pertaining to the blanket license].”<sup>9</sup> The legislative history contemplates that the Office will “thoroughly review[]”<sup>10</sup> policies and procedures established by the MLC and its three committees, of which the MLC is statutorily bound to ensure are “transparent and accountable,”<sup>11</sup> and promulgate regulations that “balance[] the need to protect the public’s interest with the need to let the new collective operate without over-regulation.”<sup>12</sup>

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<sup>6</sup> 17 U.S.C. 115(d)(7)(D).

<sup>7</sup> *Id.* at 115(d)(5)(B); 84 FR at 32274; *see also* 17 U.S.C. 115(d)(3)(D)(i)(IV), (d)(5)(C).

<sup>8</sup> H.R. Rep. No. 115-651, at 5–6; S. Rep. No. 115-339, at 5; Conf. Rep. at 4.

<sup>9</sup> 17 U.S.C. 115(d)(12)(A).

<sup>10</sup> H.R. Rep. No. 115-651, at 5–6, 14; S. Rep. No. 115-339, at 5, 15; Conf. Rep. at 4, 12. The Conference Report further contemplates that the Office’s review will be important because the MLC must operate in a manner that can gain the trust of the entire music community, but can only be held liable under a standard of gross negligence when carrying out certain of the policies and procedures adopted by its board. Conf. Rep. at 4.

<sup>11</sup> 17 U.S.C. 115(d)(3)(D)(ix)(I)(aa).

<sup>12</sup> H.R. Rep. No. 115-651, at 5–6, 14; S. Rep. No. 115-339, at 5, 15; Conf. Rep. at 4, 12. *See also* SoundExchange Initial at 15; Future of Music Coalition (“FMC”) Reply at 3 (appreciating “SoundExchange’s warning against too-detailed regulatory language,” but “urg[ing] the Office to balance this concern for pragmatism and flexibility against the need to provide as much clear

Congress acknowledged that “[a]lthough the legislation provides specific criteria for the collective to operate, it is to be expected that situations will arise that were not contemplated by the legislation,” and that “[t]he Office is expected to use its best judgement in determining the appropriate steps in those situations.”<sup>13</sup> Legislative history further states that “[t]he Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and recent assistance to the Committee[s] during the drafting of this legislation.”<sup>14</sup> Accordingly, in designating the MLC, the Office stated that it “expects ongoing regulatory and other implementation efforts to . . . extenuate the risk of self-interest,” and that “the Register intends to exercise her oversight role as it pertains to matters of governance.”<sup>15</sup> Additionally, the Office stated that it “intends to work with the MLC to help it achieve the[] goals” of “engagement with a broad spectrum of musical work copyright owners, including from those communities”

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guidance and oversight as possible to encourage trust”). All rulemaking activity, including public comments, as well as educational material regarding the Music Modernization Act, can currently be accessed via navigation from <https://www.copyright.gov/music-modernization/>. Comments received in response to the September 2019 notification of inquiry are available at <https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=COLC-2019-0002&refD=COLC-2019-0002-0001>. References to these comments and letters are by party name (abbreviated where appropriate), followed by either “Initial,” “Reply,” or “*Ex Parte* Letter,” as appropriate. Guidelines for *ex parte* communications, along with records of such communications, are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. The Office encourages parties to refrain from requesting *ex parte* meetings on this notification of inquiry until they have submitted written comments. As stated in the guidelines, *ex parte* meetings with the Office are intended to provide an opportunity for participants to clarify evidence and/or arguments made in prior written submissions, and to respond to questions from the Office on those matters.

<sup>13</sup> H.R. Rep. No. 115-651, at 14; S. Rep. No. 115-339, at 15; Conf. Rep. at 12.

<sup>14</sup> H.R. Rep. No. 115-651, at 14; S. Rep. No. 115-339, at 15; Conf. Rep. at 12.

<sup>15</sup> 84 FR at 32280.

and musical genres that some commenters in the designation proceeding asserted are underrepresented.<sup>16</sup>

This notification of inquiry is focused on considerations to ensure appropriate transparency and public disclosure of information by the mechanical licensing collective. Fostering increased transparency is an animating theme of the MMA, which envisions the MLC “operat[ing] in a transparent and accountable manner”<sup>17</sup> and ensuring that its “policies and practices . . . are transparent and accountable.”<sup>18</sup> Indeed, some Members of Congress noted that a key aspect of the MMA is bringing transparency to the music industry.<sup>19</sup> The MLC itself has expressed its commitment to transparency, both by including transparency as one of its four key principles underpinning its operations on its current website,<sup>20</sup> and in written comments to the Office.<sup>21</sup> For example, the MLC noted

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<sup>16</sup> *Id.* at 32279.

<sup>17</sup> S. Rep. No. 115-339, at 7.

<sup>18</sup> 17 U.S.C. 115(d)(3)(D)(ix)(I)(aa).

<sup>19</sup> See 164 Cong. Rec. S6292, 6293 (daily ed. Sept. 25, 2018) (statement of Senator Hatch) (“I need to thank Chairman Grassley, who shepherded this bill through the committee and made important contributions to the bill’s oversight and transparency provisions.”); 164 Cong. Rec. S 501, 504 (Senator Chris Coons stating “[t]his important piece of legislation will bring much-needed transparency and efficiency to the music marketplace.”); 64 Cong. Rec. H 3522, 3541 (Representative Steve Chabot stating “[t]his legislation provides much-needed updates to bring music licensing into the digital age, particularly improving market efficiencies and transparency to reflect the modern music marketplace.”); see also Conf. Rep. at 6 (“Music metadata has more often been seen as a competitive advantage for the party that controls the database, rather than as a resource for building an industry on.”).

<sup>20</sup> The MLC, Mission and Principles, <https://themlc.com/mission-and-principles> (last visited Apr. 10, 2020) (“The MLC will build trust by operating transparently. The MLC is governed by a board of songwriters and music publishers who will help ensure our work is conducted with integrity.”). See also The MLC, The MLC Process, <https://themlc.com/how-it-works> (last visited Apr. 10, 2020) (“The MLC is committed to transparency. The MLC will make data on unclaimed works and unmatched uses available to be searched by registered users of The MLC Portal and the public at large.”).

<sup>21</sup> See, e.g., MLC Reply at 42–43 (“The MLC is committed to transparency and submits that, while seeking to enact regulations is not an efficient or effective approach, the MLC will implement policies and procedures to ensure transparency.”).

its “commitment to working with, and under the oversight of, the Office to ensure that issues relating to its policies and procedures are transparent and appropriate, including with respect to addressing and mitigating conflicts of interest, maintaining diversity, representing the entire musical works community, and ensuring board and committee member service complies with all relevant legal requirements.”<sup>22</sup>

Further, the MMA specifically directs the Copyright Office to promulgate certain regulations related to the MLC’s creation of a free database to publicly disclose musical work ownership information and identify the sound recordings in which the musical works are embodied.<sup>23</sup> As discussed more below, the statute requires the MLC’s public database to include various types of information, depending upon whether a musical work has been matched to a copyright owner.<sup>24</sup> For both matched and unmatched works, the MLC’s database must also include “such other information” “as the Register of Copyrights may prescribe by regulation.”<sup>25</sup> The database must “be made available to members of the public in a searchable, online format, free of charge,”<sup>26</sup> as well as “in a bulk, machine-readable format, through a widely available software application,” to certain parties, including blanket licensees and the Copyright Office, free of charge, and to “[a]ny other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity.”<sup>27</sup>

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<sup>22</sup> MLC Initial at 30–31.

<sup>23</sup> See 17 U.S.C. 115(d)(3)(E), (e)(20).

<sup>24</sup> *Id.* at 115(d)(3)(E)(ii), (iii).

<sup>25</sup> *Id.* at 115(d)(3)(E)(ii)(V), (iii)(II).

<sup>26</sup> *Id.* at 115(d)(3)(E)(v).

<sup>27</sup> *Id.*

## **B. Non-Regulatory Requirements and Incentives for Transparency**

While this notice is directed at exploring ways in which the Copyright Office may reasonably and prudently exercise regulatory authority to facilitate appropriate transparency and public disclosure, it is important to note that both the statutory language as well as the MLC's structure separately include aspects that promote disclosure absent additional regulation. While the Copyright Office does not agree with the MLC that regulations regarding issues related to transparency "may be premature" because the MLC's "policies and procedures are still being developed"<sup>28</sup>—including because the statute directs the Office specifically to promulgate regulations concerning contents of the public database<sup>29</sup>—the Office does recognize that any regulatory language would be additive to this existing scheme, and should be considered within the full context of the statutory goals.

First, the statute requires the MLC to make its bylaws publicly available,<sup>30</sup> which the MLC has committed to doing.<sup>31</sup> As the Recording Academy suggested, the publication of these bylaws "are key to establishing trust, and will help assuage any outstanding concerns amongst songwriters about the MLC's operations."<sup>32</sup> Indeed, the MLC

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<sup>28</sup> MLC Initial at 31 ("The MLC believes that the promulgation of regulations concerning the Office's role in overseeing and regulating the MLC's operations and policies would be more fruitful once the MLC has fully developed its policies and procedures and is able to provide them to the Office for review.").

<sup>29</sup> 17 U.S.C. 115(d)(3)(E)(ii)(V), (iii)(II); *see also* U.S. Copyright Office, Notice of Proposed Rulemaking, *Royalty Reporting and Distribution Obligations of the Mechanical Licensing Collective*, Dkt. No. 2020-6, published elsewhere in this issue of the *Federal Register*.

<sup>30</sup> 17 U.S.C. 115(d)(3)(D)(ii)(II).

<sup>31</sup> MLC Reply at 42–43 ("The publication of the MLC's bylaws is directly addressed by the statute, with which the MLC will of course comply . . .").

<sup>32</sup> Recording Academy Initial at 4.



itself recognizes that making its bylaws publicly available “promotes transparency.”<sup>33</sup>

Second, and as noted below, the MLC must publish an annual report detailing its operations; while this notice seeks input on whether it would be appropriate to further specify contents of that report, this statutory obligation already serves as a mandate for the MLC to disclose various categories of information. Third, every five years, the MLC will submit itself to periodic public audits to ensure it does not “engage in waste, fraud and abuse,”<sup>34</sup> and so some concerns about transparency may be addressed through the statutorily-mandated exercise of this audit provision.<sup>35</sup> Fourth, in a separate provision, copyright owners may also audit the MLC to verify the accuracy of royalty payments paid by the MLC.<sup>36</sup> Fifth, the MLC must ensure that its policies and practices “are transparent and accountable”<sup>37</sup>;

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<sup>33</sup> The MLC, Transparency, <https://themlc.com/faqs/categories/transparency> (last visited Apr. 10, 2020) (noting that the MLC will “promote transparency” by “[m]aking The MLC governing bylaws public”).

<sup>34</sup> Conf. Rep. at 6 (“To ensure that the collective does not engage in waste, fraud and abuse, the collective is required to submit to periodic audits to examine its operations and procedures.”); 17 U.S.C. 115(d)(3)(D)(ix)(II). Beginning in the fourth full calendar year after the MLC’s initial designation, and in every fifth calendar year thereafter, the MLC is required to retain a qualified auditor to “examine the [MLC’s] books, records, and operations” and “prepare a report for the [MLC’s] board of directors,” which must also be provided to the Register of Copyrights. *Id.* at 115(d)(3)(D)(ix)(II)(aa), (cc).

<sup>35</sup> For each audit, the collective must retain a qualified auditor to “examine the books, records, and operations of the collective”; “prepare a report for the board of directors of the collective”; and “deliver the report . . . to the board of directors of the collective.” 17 U.S.C. 115(d)(3)(D)(ix)(II)(aa)(AA)–(CC). Each report must address the collective’s “implementation and efficacy of procedures” “for the receipt, handling, and distribution of royalty funds, including any amounts held as unclaimed royalties”; “to guard against fraud, abuse, waste, and the unreasonable use of funds”; and “to protect the confidentiality of financial, proprietary, and other sensitive information.” *Id.* at 115(d)(3)(D)(ix)(II)(bb)(AA)–(CC). And the collective must deliver each report to the Register of Copyrights and make it publicly available. *Id.* at 115(d)(3)(D)(ix)(II)(cc).

<sup>36</sup> *Id.* at 115(d)(3)(L)(i).

<sup>37</sup> *Id.* at 115(d)(3)(D)(ix)(I)(aa). In connection with a separate notice of proposed rulemaking concerning reports of usage, notices of license, and data collection efforts, among other things, the Office is addressing the MLC’s obligations under 17 U.S.C. 115(d)(3)(F)(i), and for purposes of transparency, how the MLC should confirm or reject notices of license, and terminate blanket licenses. Specifically, the rule proposes that the MLC maintain a current, free, and searchable

the MLC has suggested that it would be more fruitful to allow the MLC room to “fully develop[] its policies and procedures” and “provide them to the Office for review” before considering whether regulation in this area is advisable.<sup>38</sup> Sixth, the MLC must “identify a point of contact for publisher inquiries and complaints with timely redress.”<sup>39</sup> Seventh, the MLC must “establish an anti-comingling policy for funds” collected and those not collected under section 115.<sup>40</sup> Seventh, the MLC must fulfill a statutory mandate to outreach to songwriters and generally “publicize, throughout the music industry” its work and procedures by which copyright owners may claim their accrued royalties.<sup>41</sup> Finally, the five-year designation process established by the statute provides another avenue for the Office to periodically review the mechanical licensing collective’s performance.<sup>42</sup>

In some instances, the Office understands that the MLC has already begun working to communicate to the public regarding its transparency of operations, such as by launching an initial website and participating in various industry conferences.<sup>43</sup> The Office presumes these efforts will grow more robust as the license availability date approaches, and anticipates continued discussions with both the MLC and DLC on ways to cooperate on education and outreach. In other cases, the MLC has adopted policies that

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public list of all blanket licenses, including various details, such as information from notices of license, whether a notice of license has been rejected and why, and whether a blanket license has been terminated and why. U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the *Federal Register*.

<sup>38</sup> MLC Initial at 31.

<sup>39</sup> *Id.* at 115 (d)(3)(D)(ix)(I)(bb).

<sup>40</sup> *Id.* at 115 (d)(3)(D)(ix)(I)(cc).

<sup>41</sup> *Id.* at 115(d)(3)(J)(iii)(II).

<sup>42</sup> *See id.* at 115(d)(3)(B)(ii).

<sup>43</sup> *See* The MLC, <https://themlc.com> (last visited Apr. 10, 2020).

bear upon issues related to disclosure and governance, including by adopting a conflict of interest policy “for appropriately managing conflicts of interest in accordance with legal requirements and the MLC’s goals of accountability and transparency.”<sup>44</sup> The MLC advises that it intends to make this policy public.<sup>45</sup>

Finally, some commenters raised questions about board governance, particularly with respect to appointments and succession.<sup>46</sup> The initial designation process for MLC board and committee members, including those members’ qualifications, was detailed in the Office’s July 2019 designation of the MLC and DLC, as well as the numerous public comments received, including the MLC’s detailed submission.<sup>47</sup> In addition to the MLC’s bylaws, which necessarily detail its approach to board and committee members, the Copyright Office’s website publicizes MLC and DLC contact information, as well as the procedure by which vacancies to the MLC board of directors, statutory committees, or nonvoting board seats are filled, including the process by which the Librarian of

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<sup>44</sup> MLC Opening Submission - Part II at 21, U.S. Copyright Royalty Board, Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective, Docket No. 19-CRB-0009-AA, available at <https://app.crb.gov/case/viewDocument/7865>; *id.* (“The Conflict of Interest Policy contains clear provisions requiring disclosure of actual, potential or perceived financial or other conflicts of interest, and lays out clear procedures for assessing such conflicts and ensuring the integrity and fairness of the MLC’s business transactions.”). *See* Songwriters Guild of America, Inc. (“SGA”) Reply at 5 (“[T]he mandating of adoption by the MLC of conflict of interest policies in coordination with the USCO and the Librarian of Congress would likewise be a wise and welcome development.”).

<sup>45</sup> MLC *Ex Parte* Letter Apr. 3, 2020 (“MLC *Ex Parte* Letter #4”) at 11.

<sup>46</sup> *See* Recording Academy Initial at 4 (“[T]he Copyright Office should articulate clear standards for the MLC board regarding board operations and governance, including appointments and succession.”); Music Artists Coalition (“MAC”) Initial at 2 (expressing concern regarding the selection and makeup of the MLC board of directors and statutory committees).

<sup>47</sup> 84 FR at 32276–95.

Congress, upon the recommendation of the Register of Copyrights, appoints successive voting members to the MLC board.<sup>48</sup>

### **C. Solicitation of Additional Public Comment**

Against that backdrop, the Copyright Office seeks additional input on issues related to transparency and public disclosure of information by the MLC. On September 24, 2019, the Office issued a notification of inquiry seeking public input on a variety of aspects related to implementation of title I of the MMA, including considerations in facilitating an appropriate balance between promoting transparency and public access while protecting confidential information, as well as the scope and manner of the Office's oversight role.<sup>49</sup> The September 2019 notification of inquiry specifically asked for public input on any issues that should be considered regarding information to be included in the MLC's musical works database (*e.g.*, which specific additional categories of information might be appropriate to include by regulation), as well as the usability, interoperability, and usage restrictions of the MLC's musical works database (*e.g.*, technical or other specific language that might be helpful to consider in promulgating these regulations, discussion of the pros and cons of applicable standards, and whether historical snapshots of the database should be maintained to track ownership changes over time).<sup>50</sup> In addition, the notification of inquiry sought public comment on any issues that should be considered relating to the general oversight of the MLC.<sup>51</sup>

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<sup>48</sup> U.S. Copyright Office, MLC and DLC Contact Information, Boards of Directors, and Committees, <https://www.copyright.gov/music-modernization/mlc-dlc-info/> (last visited Apr. 10, 2020).

<sup>49</sup> 84 FR 49966, 49973 (Sept. 24, 2019).

<sup>50</sup> *Id.* at 49972.

<sup>51</sup> *Id.* at 49973.

In response, many commenters emphasized the importance of transparency of the MLC’s operations and its public database,<sup>52</sup> and urged the Office to exercise “expansive”<sup>53</sup> and “robust”<sup>54</sup> oversight. Given these public comments, and the MLC’s own recognition of the importance of transparency, the Office believes clear guidance at this time on certain areas, such as those related to annual reporting and the public musical works database, may be appropriate.

Having reviewed and carefully considered all relevant comments, the Office now seeks additional comment on the areas of inquiry below. In many areas, the Office has already received valuable information in response to the September 2019 notification of inquiry, but is providing another opportunity for comment before moving forward with a proposed rule. Commenters are reminded that while the Office’s regulatory authority is

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<sup>52</sup> See MAC Initial at 2 (indicating “the need for more transparency” regarding the MLC’s structure); Music Innovation Consumers (“MIC”) Coalition Initial at 3 (“All stakeholders in the music marketplace benefit when current and accurate information about copyright ownership is easily accessible.”); Screen Composers Guild of Canada (“SCGC”) Reply Comments at 2, U.S. Copyright Office Dkt. No. 2018-11, available at <https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=COLC-2018-0011&refD=COLC-2018-0011-0001> (“We urge you to make the choice that gives us transparency in the administration and oversight of our creative works, and a fair chance at proper compensation for those works, now and in the future.”); Iconic Artists LLC Initial Comments at 2, U.S. Copyright Office Dkt. No. 2018-11, available at <https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=COLC-2018-0011&refD=COLC-2018-0011-0001> (“In the current paradigm there is a need for greater transparency and accuracy in reporting.”); DLC Reply at 28 (noting that “transparency will be critical to ensuring that the MLC fulfills its duties in a fair and efficient manner”).

<sup>53</sup> SGA Initial at 6 (urging the Register “to exercise the expansive oversight authority granted . . . under the MMA”).

<sup>54</sup> FMC Reply at 2 (stating “the Copyright Office’s oversight of the MLC’s activities should be robust”). See also Recording Academy Initial at 4 (“the Copyright Office should articulate clear standards for the MLC board regarding board operations and governance . . .”); DLC Reply at 28 (encouraging “the Copyright Office to vigilantly exercise its ongoing authority under the MMA to ensure the success of this enterprise”); Lowery Reply at 2 (stating “the Copyright Office shouldn’t delay establishing the rules of the road”).

relatively broad, it is obviously constrained by the law Congress enacted.<sup>55</sup> After reviewing the comments received in response to this notification of inquiry, the Office is likely to publish a notice of proposed rulemaking. In recognition of the start-up nature of the collective and current transition period, as the discussion and factual development progresses, the Office will also consider whether fashioning an interim rule, rather than a final rule, may be best-suited to ensure a sufficiently responsive and flexible regulatory structure.

To aid the Office's review, it is requested that where a submission responds to more than one of the below categories, it be divided into discrete sections that have clear headings to indicate the category being discussed in each section. Comments addressing a single category should also have a clear heading to indicate which category it discusses. The Office welcomes parties to file joint comments on issues of common agreement and consensus. While all public comments are welcome, the Office encourages parties to provide specific proposed regulatory language for the Office to consider and for others to comment upon.

Concurrent with this notification of inquiry, the Office issued a notice of proposed rulemaking identifying appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in the records of the mechanical licensing collective and digital licensee coordinator is not improperly disclosed or used.<sup>56</sup>

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<sup>55</sup> See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.") (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). See also Conf. Rep. at 4, 12.

<sup>56</sup> U.S. Copyright Office, Notice of Proposed Rulemaking, *Treatment of Confidential Information by the Mechanical Licensing Collective and Digital Licensee Coordinator*, Dkt. No. 2020-7, published elsewhere in this issue of the *Federal Register*.

The Office encourages interested commenters in connection with this notification of inquiry to review that separate notice carefully and consider commenting on that notice as well.

## **II. Subjects of Inquiry**

### **A. Transparency of MLC Operations; Annual Reporting**

One avenue for transparency with respect to the MLC is through its annual report. The MMA requires the MLC to publish an annual report no later than June 30 of each year after the license availability date, setting forth information regarding: (1) its operational and licensing practices; (2) how royalties are collected and distributed; (3) budgeting and expenditures; (4) the collective total costs for the preceding calendar year; (5) the MLC's projected annual budget; (6) aggregated royalty receipts and payments; (7) expenses that are more than ten percent of the MLC's annual budget; and (8) the MLC's efforts to locate and identify copyright owners of unmatched musical works (and shares of works).<sup>57</sup> The MLC must deliver a copy of the annual report to the Register of Copyrights and make this report publicly available.<sup>58</sup>

The annual report thus functions as a statutorily-prescribed outlet for the MLC to provide much of the information requested by parties in response to the September 2019 notification of inquiry. Some commenters recognized the role that the annual reporting would play in facilitating the transparency envisioned by the MMA and the MLC itself. The DLC, for example, suggested that although the “the MMA generally specifies that the MLC's annual report must “set[] forth information regarding . . . the operational and licensing practices of the collective,” “how royalties are collected and distributed,” and

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<sup>57</sup> 17 U.S.C. 115(d)(3)(D)(vii)(I)(aa)–(hh); Conf. Rep. at 7.

<sup>58</sup> 17 U.S.C. 115(d)(3)(D)(vii)(II).

“the efforts of the collective to locate and identify copyright owners of unmatched musical works (and shares of works),” it “will be crucial for the Office to ensure that the MLC follows not just the letter of these requirements but their spirit.”<sup>59</sup> Other commenters similarly asked for MLC oversight to ensure disclosure of information in specific areas the statute envisions the annual report addressing, though without directly linking such oversight to the annual report: board governance,<sup>60</sup> the manner in which the MLC will distribute unclaimed royalties,<sup>61</sup> development updates and certifications related to its IT systems,<sup>62</sup> and the MLC’s efforts to identify copyright owners.<sup>63</sup> These comments suggest that comprehensive annual reporting may be a key means through which visibility into MLC operations occurs, and thus certain information (in addition to statutorily required information) should be included for full transparency. Indeed, the MLC itself recognizes that its annual report is one way in which it intends to “promote transparency.”<sup>64</sup>

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<sup>59</sup> DLC Initial at 24.

<sup>60</sup> Recording Academy Reply at 2 (encouraging the Copyright Office to “make oversight of the MLC a priority, particularly with regard to establishing processes and procedures for board governance”).

<sup>61</sup> Lowery Reply at 8 (expressing concern about manner in which the MLC will distribute unclaimed royalties based on market share); Monica Corton Consulting Reply at 3 (same).

<sup>62</sup> Lowery Reply at 5 (expressing concern about manner in which the MLC will disclose system updates).

<sup>63</sup> SGA Initial at 6 (asking for the Office to “mandate the undertaking through the institution of best practices, bona fide and easily reviewable efforts by the MLC to identify as great a percentage of the proper owners of unmatched royalties and titles as possible”).

<sup>64</sup> The MLC, Transparency, <https://themlc.com/faqs/categories/transparency> (last visited Apr. 10, 2020) (noting that the MLC will “promote transparency” by “[p]roviding an annual report to the public and to the Copyright Office detailing the operations of The MLC, its licensing practices, collection and distribution of royalties, budget and cost information, its efforts to resolve unmatched royalties, and total royalties received and paid out”).



As part of analyzing whether it may be beneficial to flesh out the level of detail required in the MLC's annual report through a rule, commenters may consider specific types of additional information the MLC should include. For example, a few commenters expressed a desire for more information about the MLC's vendor selection process.<sup>65</sup> While the Office may consider the MLC's capabilities, including through its vendors, during the re-designation process as part of its duty to confirm whether the collective has "the administrative and technological capabilities to perform the required functions" of the collective,<sup>66</sup> the statute vests the MLC itself with authority to "[i]nvest in relevant resources, and engage for services of outside vendors and others, to support the activities of the mechanical licensing collective."<sup>67</sup> The MLC's annual report could thus serve as a means for the collective to publicly address issues related to vendor selection criteria and performance.

Similarly, in addition to the information provided in the MLC's bylaws, which will be made publicly available, the annual report could further address issues related to MLC board and committee selection criteria. The annual report could thus disclose any

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<sup>65</sup> National Association of Independent Songwriters ("NOIS") et al. Initial at 16 ("Complete transparency through public documents and test results in regards to the selection of the vendors must be provided. This should include the methodology used for selection along with the results of any Request For Proposals, test results, pricing structure, rates and additional criteria."); MAC Initial at 3 ("The need for a fully transparent process is also deeply important in the RFI/RFP process to select a vendor."); Lowery Reply at 3, 12; SGA Reply at 4–5.

<sup>66</sup> 17 U.S.C. 115(d)(3)(A)(iii)

<sup>67</sup> *Id.* at 115(d)(3)(C)(i)(VII). *See* 84 FR at 32287 (discussing MLC applicants' proposed approaches to using vendors).

actual or potential conflicts raised with and/or addressed by its board of directors, if any, in accordance with the MLC's policy.<sup>68</sup>

The Office seeks public input on any issues that should be considered relating to the substance of the MLC's annual reports, including any proposed regulatory language. The Office welcomes views regarding any additional considerations or proposed regulatory approaches to address issues raised in the public comments beyond the annual reporting mechanism. Further, and in light of the MLC's position that regulatory language may be premature, the Office invites the MLC to publicly share with greater particularity operational and communications planning information, such as notional schedules, beta wireframes, or other documentation, to provide context to MLC stakeholders in the months leading up to the license availability date.

#### **B. Categories of Information in the MLC's Musical Works Public Database**

The MLC must establish and maintain a free public database of musical work ownership information that also identifies the sound recordings in which the musical works are embodied,<sup>69</sup> a function expected to provide transparency across the music industry.<sup>70</sup> For musical works that have been matched, the statute requires the MLC's database to include:

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<sup>68</sup> See also Lowery Reply at 8 (asserting that the MLC, including board members, officers, and key employees, should disclose financial incentives or benefits received "from any person or entity MLC does business with").

<sup>69</sup> 17 U.S.C. 115(d)(3)(E), (e)(20).

<sup>70</sup> See 164 Cong. Rec. H3522 at 3542 (daily ed. Apr. 25, 2018) (statement of Rep. Norma Torres) ("Information regarding music owed royalties would be easily accessible through the database created by the Music Modernization Act. This transparency will surely improve the working relationship between creators and music platforms and aid the music industry's innovation process."). See also The MLC, Transparency, <https://themlc.com/faqs/categories/transparency> (last visited Apr. 10, 2020) (noting that the MLC will "promote transparency" by "[p]roviding unprecedented access to musical works ownership information through a public database").

1. The title of the musical work;
2. The copyright owner of the musical work (or share thereof), and the ownership percentage of that owner;
3. Contact information for such copyright owner; and
4. To the extent reasonably available to the MLC, (a) the ISWC for the work, and (b) identifying information for sound recordings in which the musical work is embodied, including the name of the sound recording, featured artist, sound recording copyright owner, producer, ISRC, and other information commonly used to assist in associating sound recordings with musical works.<sup>71</sup>

For unmatched musical works, the statute requires the database to include, to the extent reasonably available to the MLC:

1. The title of the musical work;
2. The ownership percentage for which an owner has not been identified;
3. If a copyright owner has been identified but not located, the identity of such owner and the ownership percentage of that owner;
4. Identifying information for sound recordings in which the work is embodied, including sound recording name, featured artist, sound recording copyright owner, producer, ISRC, and other information commonly used to assist in associating sound recordings with musical works; and
5. Any additional information reported to the MLC that may assist in identifying the work.<sup>72</sup>

For both matched and unmatched works, the MLC’s database must also include “such other information” “as the Register of Copyrights may prescribe by regulation.”<sup>73</sup> The “Register shall use its judgement to determine what is an appropriate expansion of the required fields, but shall not adopt new fields that have not become reasonably accessible

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<sup>71</sup> 17 U.S.C. 115(d)(3)(E)(ii).

<sup>72</sup> *Id.* at 115(d)(3)(E)(iii).

<sup>73</sup> *Id.* at 115(d)(3)(E)(ii)(V), (iii)(II).

and used within the industry unless there is widespread support for the inclusion of such fields.”<sup>74</sup>

In considering whether to prescribe the inclusion of additional fields beyond those statutorily required, the Office will focus on fields that would advance the goal of the MLC’s database: reducing the number of unmatched works by accurately identifying musical work copyright owners so they can be paid what they are owed by digital music providers operating under the section 115 statutory license.<sup>75</sup> At the same time, the Office is mindful of the MLC’s corresponding duties to keep confidential business and personal information secure and inaccessible; for example, data related to computation of market share is contemplated by the statute as sensitive and confidential, despite some comments suggesting that this information should be publicly shared.<sup>76</sup> Recognizing that a robust musical works database may contain many fields of information, the Office tentatively concludes that this rulemaking may be most valuable in establishing a floor of required information, that copyright owners and other stakeholders can reliably expect to access in

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<sup>74</sup> Conf. Rep. at 7.

<sup>75</sup> See *id.* (noting that the “highest responsibility” of the MLC’s includes “efforts to identify the musical works embodied in particular sound recordings,” “identify[ing] and locat[ing] the copyright owners of such works so that [the MLC] can update the database as appropriate.” and “efficient and accurate collection and distribution of royalties”).

<sup>76</sup> 17 U.S.C. 115(d)(3)(J)(i)(II)(bb) (“the mechanical licensing collective shall take appropriate steps to safeguard the confidentiality and security of usage, financial, and other sensitive data used to compute market shares in accordance with the confidentiality provisions prescribed by the Register of Copyrights”). See MLC Initial at 24 (contending that not all information contained in its database “would be appropriate for public disclosure,” and that it “should be permitted to exercise reasonable judgment in determining what information beyond what is statutorily required should be made available to the public”); MAC Reply at 2–3 (suggesting “data relating to market share determinations and voluntary licenses” should be publicly shared).

the public database, while providing the MLC with flexibility to include additional data fields that it finds helpful.<sup>77</sup>

The September 2019 notification of inquiry asked which specific additional categories of information, if any, should be required for inclusion in the MLC's database, and stakeholder comments, generally furthering mandating inclusion of additional information, are discussed by category below.<sup>78</sup> To the extent additional categories of information should be made publicly available in the MLC's database, but are not discussed below, the Office invites public comments regarding those additional categories.

#### *1. Songwriter or Composer*

Multiple commenters noted the importance of the database including and making publicly available songwriter and composer information, with SGA for example noting, “[w]hile the names of copyright owners and administrators associated with a musical work may change on a constant basis, and other variables and data points are subject to frequent adjustment, the title and the names of the creators never vary from the date of a work’s creation forward.”<sup>79</sup> Others echoed the strong need for the database to include songwriter/composer information, and the MLC and DLC both proposed regulatory

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<sup>77</sup> Compare U.S. Copyright Office, Notice of Proposed Rulemaking, *Royalty Reporting and Distribution Obligations of the Mechanical Licensing Collective*, Dkt. No. 2020-6, published elsewhere in this issue of the *Federal Register* (proposing a floor of categories of information to be required in periodic reporting to copyright owners, but noting that the MLC expects to include additional information).

<sup>78</sup> 84 FR at 49972. See, e.g., SoundExchange Initial at 6 (“[T]he data fields recited in the statute should be viewed as a minimal and vaguely described set of data for understanding rights with respect to a musical work in a crowded field where there are many millions of relevant works with similar titles in different languages and complicated ownership structures to understand and communicate.”).

<sup>79</sup> See SGA Initial at 2.

language including this field.<sup>80</sup> The Office finds these comments persuasive in light of the statute, and is inclined to require that songwriter and composer information be publicly available in the MLC's database, to the extent known to the MLC.

## 2. *Studio Producer*

The statute requires the database to include “producer,” to the extent reasonably available to the MLC.<sup>81</sup> Initially, there appeared to be confusion about the meaning of this term, with the MLC originally believing that “producer” referred to “the record label or individual or entity that commissioned the sound recording.”<sup>82</sup> Following comments and discussion with Recording Academy and the Recording Industry Association of America, Inc. (“RIAA”), who compellingly suggest that the legislative intent was that the term mean refer to the studio producer, the MLC updated its understanding.<sup>83</sup> The MLC contends, however, that “the studio producer of a sound recording is not a data item that is needed operationally by the MLC,” and that the “producer” field is not included in the Common Works Registration (“CWR”) format or the DDEX DSRF format(s) that the

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<sup>80</sup> See Barker Initial at 2 (urging inclusion of “data fields for songwriters for each musical work,” for matched and unmatched works); FMC Reply at 2 (“We agree that it’s of utmost importance that the MLC database contain songwriter/composer names.”); The International Confederation of Societies of Authors and Composers (“CISAC”) & the International Organisation representing Mechanical Rights Societies (“BIEM”) Reply at 6 (“CISAC and BIEM strongly support the need for the inclusion of creators' names in the MLC Database since it is the safest information to identify a work (publishers may change, creators never change . . .”); MLC Reply at 32 (agreeing with inclusion of songwriter information for musical works); DLC Reply at 26 (agreeing “with several commenters that songwriter and composer information should be collected and included in the database”).

<sup>81</sup> 17 U.S.C. 115(d)(3)(E)(ii)(IV), (iii)(I)(dd).

<sup>82</sup> MLC Initial at 13 n.6.

<sup>83</sup> Recording Academy Initial at 3 (urging Office to “clarify that a producer is someone who was part of the creative process that created a sound recording”); RIAA Initial at 11 (stating “producer” should be defined as “the primary person(s) contracted by and accountable to the content owner for the task of delivering the recording as a finished product”); MLC Reply at 35.

MLC plans to use.<sup>84</sup> Should the MLC be provided “a single feed of authoritative sound recording data,” the MLC “proposes that the ‘studio producer’ information be included to the extent available.”<sup>85</sup>

The term “producer” relates not only to the public database, but also to other open rulemakings, including information provided by digital music providers in reports of usage. In connection with its separate NPRM concerning reports of usage, notices of license, and data collection efforts, among other things, the Office is currently proposing an overarching definition that applies throughout its section 115 regulations to clarify that “producer” refers to the studio producer.<sup>86</sup>

### 3. *Unique Identifiers*

As noted, the statute requires that ISRC and ISWC codes, when available, be included in the MLC database.<sup>87</sup> According to the legislative history, “[u]sing standardized metadata such as ISRC and ISWC codes, is a major step forward in reducing the number of unmatched works.”<sup>88</sup> The legislative history also notes that “the Register may at some point wish to consider after an appropriate rulemaking whether standardized identifiers for individuals would be appropriate, or even audio fingerprints.”<sup>89</sup>

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<sup>84</sup> MLC Reply at 35.

<sup>85</sup> *Id.* at 35–36.

<sup>86</sup> U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the *Federal Register*.

<sup>87</sup> 17 U.S.C. 115(d)(3)(E)(ii)–(iii).

<sup>88</sup> Conf. Rep. at 7.

<sup>89</sup> *Id.*

The DLC proposes that the MLC’s database should include “any standard identifiers . . . used for creators and copyright owners themselves,” such as Interested Parties Information (IPI)<sup>90</sup> or International Standard Name Identifier (“ISNI”),<sup>91</sup> to the extent reasonably available to the MLC.<sup>92</sup> For its part, SoundExchange asserts that the “CWR standard contemplates a much richer set of information about ‘interested parties’ linked to CISAC’s Interested Party Information (‘IPI’) system, including information about songwriters and publishers at various levels,” and so the database should include and make available a full set of information about interested parties involved in the creation and administration of the musical work, including shares and identifiers.”<sup>93</sup>

The MLC plans to include the IPI number and ISNI in the public database, but does not believe it should be required to do so through regulation.<sup>94</sup> The MLC also plans to create its own proprietary identifier for each musical work in the database, and while it does not identify which, the MLC “is giving careful consideration to the virtue of also

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<sup>90</sup> IPI is “[a] unique identifier assigned to rights holders with an interest in an artistic work, including natural persons or legal entities, made known to the IPI Centre. The IPI System is an international registry used by CISAC and BIEM societies.” U.S. Copyright Office, Glossary, <https://www.copyright.gov/policy/unclaimed-royalties/glossary.pdf>.

<sup>91</sup> ISNI is “[a] unique identifier for identifying the public identities of contributors to creative works, regardless their legal or natural status, and those active in their distribution. These may include researchers, inventors, writers, artists, visual creators, performers, producers, publishers, aggregators, and more. A different ISNI is assigned for each name used. ISNI is not widely in use across the music industry.” U.S. Copyright Office, Glossary, <https://www.copyright.gov/policy/unclaimed-royalties/glossary.pdf>.

<sup>92</sup> DLC Initial at 21; DLC Reply Add. at A-16.

<sup>93</sup> SoundExchange Initial at 8; *see id.* at 7–8 (“Reflecting all applicable unique identifiers in the MLC Database will allow users of the MLC Database readily to match records in the database to other databases when ISWC is not included in one or the other of the databases.”).

<sup>94</sup> MLC Reply at 33.



including third party proprietary musical work identifiers to aid interoperability of its database.”<sup>95</sup>

The Office seeks public input on issues relating to the inclusion of unique identifiers for musical works in the MLC’s database, including whether regulations should require including IPI or ISNI, the MLC’s own standard identifier, or any other specific additional standard identifiers reasonably available to the MLC, along with supporting rationale.

#### *4. Information Related to Ownership and Control of Musical Works*

By statute, the MMA database must include information related to the ownership of the musical work as well as the underlying sound recording, including “the copyright owner of the work (or share thereof), and the ownership percentage of that owner,” or, if unmatched, “the ownership percentage for which an owner has not been identified.”<sup>96</sup> The statute also requires a field called “sound recording copyright owner,” the meaning of which is discussed further below.

The DLC proposed that the MLC database should include, to the extent available to the MLC, “all additional entities involved with the licensing or ownership of the musical work, including publishing administrators and aggregators, publishers and sub-publishers, and any entities designated to receive license notices, reporting, and/or royalty payment on the copyright owners’ behalf.”<sup>97</sup> Similarly, SoundExchange observes that “[c]ommercialization of musical works often involves chains of publishing, sub-publishing and administration agreements that determine who is entitled to be paid for

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<sup>95</sup> *Id.* at 34.

<sup>96</sup> 17 U.S.C. 115(d)(3)(C)(E)(ii)–(iii).

<sup>97</sup> DLC Reply Add. at A-16.

use of a work,” and that the CWR standard contemplates gathering this information, such that the MLC database should also collect and make available this information.<sup>98</sup>

The MMA does not specifically call out music publishing administrators, that is, entities responsible for managing copyrights on behalf of songwriters, including administering, licensing, and collecting publishing royalties without receiving an ownership interest in such copyrights. One music publishing administrator noted that because “the copyright owner may not necessarily be the entity authorized to control, license, or collect royalties for the musical work,” the MLC’s database should include information identifying the administrators or authorized entities who license or collect on the behalf of musical work copyright owners.<sup>99</sup> He also proposes that because “a copyright owner’s ‘ownership’ percentage may differ from that same owner’s ‘control’ percentage,” the MLC’s database should include separate fields for “control” versus “ownership” percentage.<sup>100</sup> The MLC agrees with this approach.<sup>101</sup>

In addition, with respect to specific ownership percentages, which are required by statute to be made publicly available, SoundExchange raises the question of how the database should best address “the frequent situation (particularly with new works) where the various co-authors and their publishers have, at a particular moment in time, collectively claimed more or less than 100% of a work.”<sup>102</sup> Noting that it may be difficult for the MLC to withhold information regarding the musical work until shares equal 100%

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<sup>98</sup> SoundExchange Initial at 8.

<sup>99</sup> Barker Initial at 2.

<sup>100</sup> *Id.* at 3.

<sup>101</sup> MLC Reply at 32.

<sup>102</sup> SoundExchange Initial at 8–9.

(the practice of other systems), it suggests the MLC “make available information concerning the shares claimed even when they total more than 100% (frequently referred to as an ‘overclaim’) or less than 100% (frequently referred to as an ‘underclaim’).”<sup>103</sup>

The Office tentatively concludes that it will be beneficial for the database to include information related to all persons or entities that own or control the right to license and collect royalties related to musical works in the United States, including that music publishing administrator and control information would be valuable additions. With respect to the question SoundExchange raises regarding works that may reflect underclaiming and overclaiming of shares, the Office suggests that the MLC’s dispute resolution committee may be an appropriate forum to consider this issue, as part of the committee’s charge to establish policies and procedures related to resolution of disputes related to ownership interests in musical works.<sup>104</sup> In general, the Office seeks public input on any further issues related to inclusion of this information in the public musical works database, including proposed regulatory approaches.

#### *5. Additional Information Related to Identifying Musical Works and Sound Recordings*

Commenters proposed that the public database include various other fields to identify the musical work at issue or the sound recording in which it is embodied. With respect to musical works, some commenters pointed to fields included in the existing Common Works Registration (CWR) format, and supported inclusion of information

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<sup>103</sup> *Id.*; see *id.* at 15 (“[U]sers of the MLC Database should be able to access information about situations in which there are conflicting claims to a work, including an overclaim (i.e., a situation where putative copyright owners have claimed shares that collectively amount to more than 100% of the work), so as to be able to understand the extent of the overlap and the rightsholders whose claims are involved.”).

<sup>104</sup> 17 U.S.C. 115(d)(3)(K).

relating to alternate titles for musical works,<sup>105</sup> whether the work utilizes samples and medleys of preexisting works,<sup>106</sup> and opus and catalogue numbers and instrumentation of classical compositions.<sup>107</sup> With respect to sound recordings, commenters suggested inclusion of information relating to track duration, version, and release date of sound recording.<sup>108</sup>

The MLC acknowledges the merits of including such information, noting it “recognizes CWR as the *de facto* industry standard used for registration of claims in musical works, and intends to use CWR as its primary mechanism for the bulk electronic registration of musical works data.”<sup>109</sup> While cautioning that it “continues to believe that overregulation is unnecessary and may be detrimental to the MLC’s ability to adapt its musical works database as necessary to ensure its usefulness in identifying musical works,”<sup>110</sup> it amended its proposed regulatory language to clarify that the database would include “alternative titles of the musical work, and to the extent available to the mechanical licensing collective, the track duration, version title and release date of any

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<sup>105</sup> See RIAA Initial at 8 (“Sometimes the official title of a song includes an alternate title, or a primary title followed by a second, parenthetical title.”); MLC Reply at 32 (agreeing with inclusion of alternate titles for musical works).

<sup>106</sup> SoundExchange Initial at 9 (noting that the CWR standard contemplates provision of such information).

<sup>107</sup> *Id.* (noting that the CWR standard contemplates provision of such information).

<sup>108</sup> See MLC Reply at 33, App. E (agreeing with inclusion of duration, version, and release year of the sound recording, to the extent available to the MLC); Recording Academy Initial at 3 (noting such information would “help distinguish between songs that have been recorded and released under different titles or by different artists multiple times”); RIAA Initial at 6–7 (same);. RIAA recommends revising the “sound recording name” field to “sound recording track title,” or in the alternative, “sound recording name/sound recording track title.” *Id.* at 10–11.

<sup>109</sup> MLC Reply at 38.

<sup>110</sup> *Id.* at 32.

sound recordings embodying a particular musical work.”<sup>111</sup> The MLC’s proposal would also require the database to include additional fields “reported to the mechanical licensing collective as may be useful for the identification of musical works that the mechanical licensing collective deems appropriate to publicly disclose.”<sup>112</sup> In a separate concurrent notice of proposed rulemaking, the Office has proposed requiring that the MLC report certain data fields in royalty statements provided to copyright owners to the extent such information is “known” to the MLC as a regulatory floor, while encouraging the MLC to report additional information.<sup>113</sup> And the Office has issued a notice of proposed rulemaking regarding the circumstances under which digital music providers must provide these and other fields to the MLC in reports of usage.<sup>114</sup>

Here, too, the Office would like to avoid a regulatory approach that discourages the MLC from including additional fields that it determines may be useful to include in the public database. The Office invites further public comment on these issues, including whether a regulatory structure similar to that proposed for the MLC’s provision of data in royalty statements to copyright owners is appropriate regarding information to be made publicly available in the MLC’s database, including what, if any, additional fields should be required as part of a regulatory floor.

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<sup>111</sup> *Id.* at App. E.

<sup>112</sup> *Id.*

<sup>113</sup> U.S. Copyright Office, Notice of Proposed Rulemaking, *Royalty Reporting and Distribution Obligations of the Mechanical Licensing Collective*, Dkt. No. 2020-6, published elsewhere in this issue of the *Federal Register*.

<sup>114</sup> U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the *Federal Register*.

## 6. *Performing Rights Organization Affiliation*

A few commenters contend that the MLC's database should include performing rights organization ("PRO") affiliation, with MIC Coalition for example asserting that "[a]ny data solution must not only encompass mechanical rights, but also provide information regarding public performance rights, including PRO affiliation and splits of performance rights."<sup>115</sup> The MLC points out that its "primary responsibility is to engage in the administration of mechanical rights and to develop and maintain a mechanical rights database," and that "gather[ing], maintain[ing], updat[ing] and includ[ing] . . . performance rights information – which rights it is not permitted to license – would require significant effort which could imperil [its] ability to meet its statutory obligations with respect to mechanical rights licensing and administration by the [license availability date]."<sup>116</sup> FMC agrees, and further notes the challenge in keeping PRO affiliation information accurate and up-to-date.<sup>117</sup> The largest PROs, The American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), similarly object that because "music performing rights organizations such as BMI and ASCAP all have comprehensive databases on musical works ownership rights, and these

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<sup>115</sup> MIC Coalition Initial at 2. *See* DLC Initial at 20 (suggesting that including PRO affiliation "will ensure that the MLC's database is fully usable, including as a resource for direct licensing activities"); *see* Barker Initial at 8–9.

<sup>116</sup> MLC Reply at 36.

<sup>117</sup> FMC Reply at 3 ("[I]t's difficult to see how including PRO information in the MLC database could work—as the MLC won't be paying PROs, it's hard to envision what would incentivize keeping this data accurate and authoritatively up to date. Repertoire transparency is important, but it is not the Copyright Office's job to facilitate MIC's members' efforts to bypass Performing Rights Organizations that offer songwriters collective representation.").

databases are publicly available,” “administration of data with respect to the licensing of public performing rights does not require government intervention.”<sup>118</sup>

Because the MMA explicitly restricts the MLC from licensing performance rights, it seems unlikely to be prudent or frugal to require the MLC to expend resources to maintain PRO affiliations for rights it is not permitted to license.<sup>119</sup> Having considered these comments, the statutory text, and legislative history, the Office tentatively concludes against requiring the MLC to include PRO affiliation in its database. This conclusion does not inhibit PRO access or use of the database for their own efforts, and explicitly permits bulk access for a fee that does not exceed the MLC’s marginal cost to provide such access; nor does it restrict the MLC from optionally including such information.<sup>120</sup>

## *7. Terminations*

Title 17 allows, under certain circumstances, authors or their heirs to terminate an agreement that previously granted one or more of the author’s exclusive rights to a third party.<sup>121</sup> One commenter suggests that to the extent terminations of musical work grants have occurred, the MLC’s database should include “separate iterations of musical works with their respective copyright owners and other related information, as well as the appropriately matched recording uses for each iteration of the musical work, and to make clear to the public and users of the database the appropriate version eligible for future

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<sup>118</sup> ASCAP & BMI Reply at 2.

<sup>119</sup> 17 U.S.C. 115(d)(3)(C)(iii) (limiting administration of voluntary licenses to “only [the] reproduction or distribution rights in musical works for covered activities.”).

<sup>120</sup> *Id.* at 115(d)(3)(E)(v). *See* Barker Initial at 9.

<sup>121</sup> 17 U.S.C. 203, 304(c), 304(d).

licenses.”<sup>122</sup> Separately, as addressed in a parallel rulemaking, the MLC has asked that the Office require digital music providers to include server fixation dates for sound recordings, contending that this information will be helpful to its determination whether particular usage of musical works is affected by the termination of grants under this statutory provision.<sup>123</sup> The DLC has objected to this request.<sup>124</sup>

Understanding that termination issues can be complex, the Copyright Office notes that presumably, any requirement to denote whether termination rights are relevant should be conditioned upon information provided to the MLC, and/or otherwise reasonably available to it. The Copyright Office seeks public input on issues that should be considered relating to whether the proposed rule should address the inclusion of termination information in the MLC’s database.

#### 8. *Data Provenance*

The DLC contends that if the MLC’s database includes third-party data, “it should be labeled as such.”<sup>125</sup> The DLC’s proposed language suggests that for musical work copyright owner information, the MLC’s database should indicate “whether the ownership information was received directly from the copyright owner or from a third party.”<sup>126</sup> SoundExchange agrees, stating that “the MLC Database should identify the

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<sup>122</sup> Barker Initial at 4.

<sup>123</sup> MLC Reply at 19, 55. *See also* U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the *Federal Register*.

<sup>124</sup> DLC *Ex Parte* Letter Feb. 14, 2020 (“DLC *Ex Parte* Letter #1”) at 3; DLC *Ex Parte* Letter #1 Presentation at 15; DLC *Ex Parte* Letter Feb. 24, 2020 (“DLC *Ex Parte* Letter #2”) at 4; DLC *Ex Parte* Letter Mar. 4, 2020 (“DLC *Ex Parte* Letter #3”) at 5.

<sup>125</sup> DLC Initial at 20.

<sup>126</sup> DLC Reply Add. A-15–16.



submitters of the information in it, because preserving that provenance will allow the MLC and users of the MLC to make judgments about how authoritative the information is.”<sup>127</sup> Others commenters noted that for sound recordings, first-hand data is more likely to be accurate.<sup>128</sup> Separately, the Copyright Office is addressing certain sourcing issues with respect to data collection efforts and information provided by digital music providers in a parallel rulemaking proceeding.<sup>129</sup>

The Office appreciates that issues related to data sourcing, confidence in data quality, accurate copyright ownership information, and agency or licensing arrangements, can be nuanced. The Office tentatively believes that the MLC may be better-suited to explore the best way to promote accuracy and transparency in issues related to data provenance without such regulatory language, including through the policies and practices adopted by its dispute resolution and operations committees, and by establishing digital accounts through which copyright owners can view, verify, or adjust information.

The Office seeks further public input on any issues that should be considered relating to the identification of data sourcing in the MLC’s database, including whether (and how) third-party data should be labeled.

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<sup>127</sup> SoundExchange Initial at 10–11.

<sup>128</sup> The American Association of Independent Music (“A2IM”) & RIAA Reply at 2 (asserting MLC should be required to obtain its sound recording data from a single authoritative source); Jessop Initial at 3 (“The MLC should obtain sound recording information from as close to the source as possible. In practice this means from the record label or someone directly or indirectly authorized to manage this information for them.”).

<sup>129</sup> U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the *Federal Register*.

### 9. *Historical Data*

Again pointing to the CWR standard, SoundExchange asserts that the MLC database should “maintain and make available historical interested party information so it is possible to know who is entitled to collect payments for shares of a work both currently and at any point in the past.”<sup>130</sup> As noted above, the DLC has also proposed that the MLC database include “information regarding each entity in the chain of copyright owners and their agents for a particular musical work” as well as “relational connections between each of these entities for a particular musical work.”<sup>131</sup> The MLC sought clarity about the DLC’s specific proposal, suggesting “[i]t is unclear whether the DLC. . . is referring to the entire historical chain of title for each musical work. If so, the MLC objects that “such information is voluminous, burdensome to provide and maintain, and in this context unnecessary and must not be required.”<sup>132</sup> The MLC intends, however, to maintain information in its database about “each and every entity that, at any given point in time, owns a share of the right to receive mechanical royalties for the use of a musical work in covered activities.”<sup>133</sup>

The Copyright Office tentatively agrees with the MLC’s approach to focus on current relationships with respect to this rulemaking, but welcomes further public input.<sup>134</sup> The Office notes that separately, the MLC must maintain all material records of

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<sup>130</sup> SoundExchange Initial at 10.

<sup>131</sup> DLC Initial at 20.

<sup>132</sup> MLC Reply at 34.

<sup>133</sup> *Id.*

<sup>134</sup> The Office does not envision language *prohibiting* the MLC from providing such historical information.

the operations of the mechanical licensing collective in a secure and reliable manner, and such information will also be subject to audit.<sup>135</sup>

### **C. Sound Recording Copyright Owner Information and Disclaimers or Disclosures in MLC Public Database**

RIAA, and individual record labels, expressed concern about which information will populate and be displayed to satisfy the statutory requirement to include “sound recording copyright owner” (SRCO) in the MLC’s database. Specifically, RIAA explained that under current industry practice, digital music providers send royalties pursuant to information received from record companies or others releasing recordings to DMPs “via a specialized DDEX message known as the ERN (or Electronic Release Notification),” which is “typically populated with information about the party that is entitled to receive royalties (who may or may not be the actual legal copyright owner), because that is the information that is relevant to the business relationship between record labels and DMPs.”<sup>136</sup> In short, information in “the ERN message is not meant to be used to make legal determinations of ownership.”<sup>137</sup> RIAA notes the potential for confusion stemming from the SRCO field in the MLC database being populated from the labels’ ERN messages—for both the MLC (*i.e.*, the MLC could “inadvertently misinterpret or misapply SRCO data”), and users of the free, public database (*i.e.*, they could mistakenly assume that the sound recording copyright owner information is authoritative with

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<sup>135</sup> 17 U.S.C. 115(d)(3)(M)(i); *id.* at 115(d)(3)(D)(ix)(II)(aa).

<sup>136</sup> RIAA Initial at 2. Although the RIAA’s initial comments suggested that the ERN feed included a field labeled sound recording copyright owner (SRCO), upon reply, it clarified that there is no such specific field. *See* A2IM & RIAA Reply at 8 n.5.

<sup>137</sup> RIAA Initial at 2.

respect to ownership of the sound recording).<sup>138</sup> Separate but relatedly, SoundExchange notes that it “devotes substantial resources” to tracking changes in sound recording rights ownership, suggesting that inclusion of this field “creates a potential trap for the unwary.”<sup>139</sup>

Those concerns were echoed in *ex parte* meetings with individual record labels. Universal Music Group (“UMG”) explained that “actual copyright ownership is irrelevant” in the digital supply chain, as “DMPs only need to know who to pay and, maybe, who to call,” whereas record companies separately track copyright ownership information.<sup>140</sup> UMG suggested that the MLC’s inclusion of a field labeled “sound recording copyright owner” might confuse relations between the actual copyright owner and the record label conveying information to the DMP, where the label is functioning as a non-copyright owner distributor through a licensing or press and distribution (P&D) arrangement.<sup>141</sup> Sony Music (“Sony”) expressed similar concerns, suggesting that the Office’s regulations specify how the “sound recording copyright owner” line in the MLC’s database should be labeled or defined to minimize confusion.<sup>142</sup> Specifically, Sony suggested that three fields—DDEX Party Identifier (DPID), LabelName, and PLine—may provide indicia relevant to determining sound recording copyright ownership, noting that “DIY artists and aggregators serving that community” may be

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<sup>138</sup> *Id.* at 3; *see id.* (“If database users seek out and enter into sound recording licenses with the wrong parties and/or make payments to the wrong parties—because they misunderstand what the data in the SRCO column of the MLC database actually represents—that would negatively impact our member companies and the artists whose recordings they own and/or exclusively license.”).

<sup>139</sup> SoundExchange Initial at 11–12.

<sup>140</sup> UMG & RIAA *Ex Parte* Letter at 2.

<sup>141</sup> *Id.* at 2–3.

<sup>142</sup> Sony & RIAA *Ex Parte* Letter at 1–2.

most likely to populate the DPID field.<sup>143</sup> In reply comments, A2IM & RIAA also identified these same three fields.<sup>144</sup>

The Copyright Office received no comments disputing the labels’ description of industry practice. As the MMA also requires “sound recording copyright owner” to be reported by DMPs to the MLC in monthly reports of usage, the Office has separately proposed a rule regarding which information should be included in such reports to satisfy this requirement. That rule proposes that DMPs can satisfy this obligation by reporting information in each of the fields identified by the labels: DDEX Party Identifier (DPID), LabelName, and PLine.<sup>145</sup> The Office seeks public comment regarding which data the proposed rule should require including in the MLC database to satisfy the statutory requirement, including whether to require inclusion of multiple fields to lessen the perception that a single field contains definitive data regarding sound recording copyright ownership information.<sup>146</sup> The Office also welcomes comments related to the labelling of such field(s). For example, contending that in many cases, the PLine names an individual who may wish not to be listed in a public database, A2IM & RIAA suggest that the MLC database include the DPID name, publicly listed as “Party Delivering the Sound Recording to the DMP” and the LabelName, listed as “Releasing Party (if provided).<sup>147</sup> Finally, since these concerns connect directly to the ERN standard, the Office welcomes any information regarding whether it is likely that the ERN standard may evolve in a

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<sup>143</sup> *Id.*

<sup>144</sup> A2IM & RIAA Reply at 8–10.

<sup>145</sup> U.S. Copyright Office, Notice of Proposed Rulemaking, *Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment*, Dkt. No. 2020-5, published elsewhere in this issue of the *Federal Register*.

<sup>146</sup> 17 U.S.C. 115(d)(3)(E)(ii), (iii).

<sup>147</sup> A2IM & RIAA Reply at 9–10.

relevant manner, and again reiterates its commitment to ensuring appropriate regulatory flexibility.

Relatedly, the Office also notes that it has received persuasive comments requesting that the MLC be required to include a conspicuous disclaimer regarding sound recording copyright ownership information in its database. For example, RIAA suggests that the MLC should be required to “include a clear and conspicuous disclaimer on the home screen of the public database that it does not purport to provide authoritative information regarding sound recording copyright owner information.”<sup>148</sup> A2IM & RIAA, CISAC & BIEM, and SoundExchange agree that the MLC’s database should display such a disclaimer.<sup>149</sup> And the MLC itself has agreed to display a disclaimer that its database should not be considered an authoritative source for sound recording information.<sup>150</sup> Similarly, given the current record regarding these issues, the Office is not presently inclined to require that the MLC include information relating to sound recording copyright owner with the same prominence as other information related to matched and unmatched musical works. The Office invites comment on these issues.

#### **D. Access to Public Information in the MLC’s Database**

As noted above, the statute directs the Copyright Office to “establish requirements by regulations to ensure the usability, interoperability, and usage restrictions of the

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<sup>148</sup> RIAA Initial at 10.

<sup>149</sup> A2IM & RIAA Reply at 9 (urging Office to require “a strong, prominent disclaimer” to “make[] it explicitly clear that the database does not purport to provide authoritative information about sound recording copyright ownership”); CISAC & BIEM Reply at 8 (“CISAC and BIEM also encourage the use of appropriate disclaiming language in regard to the content of the database, where necessary.”); SoundExchange Initial at 12 (“At a minimum, the MLC Database should at least include a disclaimer that the MLC Database is not an authoritative source of sound recording rights owner information.”).

<sup>150</sup> MLC Reply at 37.

[MLC's] musical works database.”<sup>151</sup> The database must “be made available to members of the public in a searchable, online format, free of charge.”<sup>152</sup> The MLC must make the data available “in a bulk, machine-readable format, through a widely available software application,” to digital music providers operating under valid notices of license, compliant significant nonblanket licensees, authorized vendors of such digital music providers or significant nonblanket licensees, and the Copyright Office, free of charge, and to “[a]ny other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity.”<sup>153</sup> The legislative history stresses the importance of the MLC's database and making it available to “the public without charge, with the exception of recovery of the marginal cost of providing access in bulk to the public.”<sup>154</sup> It adds that “[i]ndividual lookups of works shall be free although the collective may implement reasonable steps to block efforts to bypass the marginal cost recovery for bulk access if it appears that one or more entities are attempting to download the database in bulk through repeated queries.”<sup>155</sup> And it further states that “there shall be no requirement that a database user must register or otherwise turn over personal information in order to obtain the free access required by the legislation.”<sup>156</sup>

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<sup>151</sup> 17 U.S.C. 115(d)(3)(E)(vi).

<sup>152</sup> *Id.* at 115(d)(3)(E)(v).

<sup>153</sup> *Id.* at 115(d)(3)(E)(v).

<sup>154</sup> H.R. Rep. No. 115-651, at 8; S. Rep. No. 115-339, at 8; Conf. Rep. at 7.

<sup>155</sup> H.R. Rep. No. 115-651, at 8; S. Rep. No. 115-339, at 8–9; Conf. Rep. at 7.

<sup>156</sup> H.R. Rep. No. 115-651, at 8; S. Rep. No. 115-339, at 9; Conf. Rep. at 7.

### *1. Method of Access*

The DLC maintains that the MLC should not be required to provide more than “[b]ulk downloads (either of the entire database, or of some subset thereof) in a flat file format, once per week per user,” and “[o]nline song-by-song searches to query the database, e.g., through a website.”<sup>157</sup> The DLC also contends that “it would be unreasonable for digital music providers and significant nonblanket licensees to foot the bill for database features that would only benefit entities or individuals who are not paying a fair share of the MLC’s costs,”<sup>158</sup> and that APIs are “not needed by digital music providers and significant nonblanket licensees.”<sup>159</sup>

In response, multiple commenters assert that real-time access to the MLC’s database—not merely a weekly file—is necessary to meet the goals of the statute. For example, SoundExchange replied that “[w]eekly downloads of a copy of the database are distinctly different and less useful than real-time access to current data,” noting that the MLC will be making constant updates and thus a weekly download would quickly become out of date.<sup>160</sup> SoundExchange asserts that failure to provide real-time access “could unfairly distort competition for musical work license administration services by giving the MLC and its vendors preferred access to current data,” and that the Office

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<sup>157</sup> DLC Initial at 21.

<sup>158</sup> *Id.*

<sup>159</sup> DLC Reply at 26.

<sup>160</sup> SoundExchange Reply at 4–5, 7 (noting that its Rights Management Department is “devoted to ensuring that our rights management database is always populated with the most current information about who is entitled to be paid for use of the sound recordings in our repertoire database,” and that they “make changes to our rights management database all day every day”); *see* SoundExchange Initial at 13–14 (“no third party maintaining a local musical work repertoire database will ever be able to obtain and maintain ownership information as current and accurate as the MLC’s. Providing robust API access to the MLC Database will discourage the creation and maintenance of less accurate local alternatives, promoting accurate licensing of and payment for musical works.”).



should “maintain[] a level playing field in the market for musical work license administration services.”<sup>161</sup> A2IM & RIAA also note that it would be “damaging to the entire music ecosystem for third parties to utilize stale data, especially if they use it in connection with some sort of public-facing, data-related business or to drive licensing or payment decisions.”<sup>162</sup>

Further, RIAA, SoundExchange, FMC, MAC, and the Recording Academy all stress the importance of real-time access to the MLC’s database through APIs.<sup>163</sup> MAC asserts that having API access and ensuring interoperability “with other systems is the best way to make certain the MLC database becomes part of the overall music licensing ecosystem.”<sup>164</sup> SoundExchange challenges the DLC’s assertion that providing APIs would be financially burdensome, stating that “it is not obvious that there would be a significant cost difference between providing full API access and the diminished access the DLC describes.”<sup>165</sup> Sound Exchange also notes that in the designation of the

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<sup>161</sup> SoundExchange Reply at 9. *See also id.* at 5 (“Making only last week’s data available to bulk users would also result in a curious situation where members of the public with free access to the MLC Database to search for information on individual works would seem to have access to more current data than commercial users with bulk access, who in some cases would have to pay for such access.”).

<sup>162</sup> A2IM & RIAA Reply at 7.

<sup>163</sup> RIAA Initial at 11 (“To facilitate efficient business-to-business use of the MLC database, the regulations should require the MLC to offer free API access to registered users of the database who request bulk access.”); SoundExchange Reply at 4–5; FMC Reply at 3 (concurring with SoundExchange’s recommendations about API access, “including the recommendations that API access include unique identifiers, catalog lookup, and fuzzy searching”); Recording Academy Initial at 4 (“ensuring that the database has a user-friendly API and ‘machine-to-machine’ accessibility is important to its practical usability”).

<sup>164</sup> MAC Initial at 2.

<sup>165</sup> SoundExchange Reply at 8.

mechanical licensing collection, the Office stated that both applicants intended to develop APIs.<sup>166</sup>

At this time, the Office is tentatively disinclined to regulate the precise format in which the MLC provides bulk access to its database (*e.g.*, APIs), so as to provide the MLC flexibility as technology develops in providing database access. The Office notes, however, that Congress clearly envisioned use of the MLC’s database by entities other than digital music providers and significant nonblanket licensees.<sup>167</sup> Moreover, the MLC’s database is meant to serve as an authoritative source of information regarding musical work ownership information,<sup>168</sup> and provide transparency. These goals support real-time access to the MLC’s database, either via bulk access or online song-by-song searches.<sup>169</sup>

The Office seeks public input on any issues that should be considered relating to access to the MLC’s database, including proposed regulatory language that would

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<sup>166</sup> *Id.* at 3 (citing 84 FR at 32289). In its September 2019 notification of inquiry, the Office noted that “[MLC] stated that it strongly support[s] the adoption of standards, formats, and frameworks that allow information to be easily and accurately shared throughout the industry, and that good systems functioning and architectural practices instruct that components should have proper APIs.” 84 FR at 49972.

<sup>167</sup> *See* 17 U.S.C. 115(d)(3)(E)(v) (granting bulk access to the MLC’s database to “[a]ny other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity”). *See also* RIAA Initial at 11 (asserting that record labels “anticipate making frequent use of the MLC database”).

<sup>168</sup> *See* 17 U.S.C. 115(d)(3)(E), (e)(20).

<sup>169</sup> *See* MIC Coalition Initial at 3 (“The opaqueness of the current music marketplace creates uncertainty that disproportionately harms small artists and independent publishers and stifles innovation. All stakeholders in the music marketplace benefit when current and accurate information about copyright ownership is easily accessible. We believe this transparency is a necessary baseline in creating a more sustainable and equitable system, and a good step toward supporting greater fairness in the music marketplace.”).

facilitate the MLC's provision of real-time access to the database (bulk and online song-by-song).

## 2. *Marginal Cost*

Despite the statute and legislative history stating third parties may be charged the “marginal cost” of being provided bulk access, A2IM & RIAA express concern about making the MLC's database available to third parties “unless the fee those third parties are required to pay takes into account the cost for the MLC to acquire that data and all of the costs and hard work that goes into creating, compiling, verifying, deduping, etc. the sound recording data that will reside within the MLC database and the potential opportunity costs to [record labels] of having that data available to third parties via the MLC.”<sup>170</sup> RIAA contends that otherwise third-party businesses “would be able to access that data at a highly subsidized, below-market price.”<sup>171</sup> RIAA asks the Office to define “marginal cost” to “include not just the cost of creating and maintaining the bulk access, but also the cost to the MLC of acquiring the data, including payment to the data source, for the hard work of aggregating, verifying, deduping and resolving conflicts in the data.”<sup>172</sup>

The Office tentatively declines this request. It is not clear that “marginal cost” is a vague term, and at this point, the Office believes the MLC should be able to determine

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<sup>170</sup> A2IM & RIAA Reply at 7.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 8.

the best pricing information in light of its operations, based on the statutory and legislative history language.<sup>173</sup>

### 3. *Abuse*

The Office does welcome comments regarding proposed regulatory language to deter abusive third-party access to the database. The legislative history states that in cases of block efforts by third parties to bypass the marginal cost recovery for bulk access (*i.e.*, abuse), the MLC “may implement reasonable steps to block efforts to bypass the marginal cost recovery for bulk access if it appears that one or more entities are attempting to download the database in bulk through repeated queries.”<sup>174</sup> Both the MLC and DLC propose regulatory language that would provide the MLC discretion to block efforts to bypass the marginal cost recovery.<sup>175</sup> A2IM & RIAA also suggest that the MLC be required to implement technological protection measures (“TPMs”) to reduce the likelihood of third parties “scraping” data without paying any fee.<sup>176</sup> The Office agrees that, in principle, the MLC should at a minimum have such discretion. The Office seeks public input on any issues that should be considered relating to regulatory language concerning the MLC’s ability to block efforts to bypass the marginal cost recovery,

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<sup>173</sup> See Conf. Rep. at 7 (“Given the importance of this database, the legislation makes clear that it shall be made available to the Copyright Office and the public without charge, with the exception of recovery of the marginal cost of providing access in bulk to the public.”). See also Music Reports Initial at 5 (“Music Reports notes that the marginal cost of automated daily data delivery protocols is relatively trivial, and calls upon the Office to ensure that such automated delivery be made available upon the first availability of the MLC’s database, and that the fee schedule scrupulously adhere to the ‘marginal cost’ standard.”).

<sup>174</sup> H.R. Rep. No. 115-651, at 8; S. Rep. No. 115-339, at 8–9; Conf. Rep. at 7.

<sup>175</sup> MLC Initial at 25; DLC Reply Add. at A-17.

<sup>176</sup> A2IM & RIAA Reply at 7.

particularly how to avoid penalizing legitimate users while providing the MLC flexibility to police abuse, and whether regulatory language should address application of TPMs.

#### *4. Restrictions on Use*

CISAC & BIEM ask the Copyright Office to issue regulations defining “strict terms and conditions” for use of data from the MLC’s database by digital music providers and significant nonblanket licensees (and their authorized vendors), “including prohibition for DSPs to use data for purposes other than processing uses and managing licenses and collaborating with the MLC in data collection.”<sup>177</sup> By contrast, the DLC maintains that “licensees should be able use the data they receive from the MLC for any legal purpose.”<sup>178</sup> While the MLC “agrees that there should be some reasonable limitation on the use of the information to ensure that it is not misappropriated for improper purposes” and “intends to include such limitation in its terms of use in the database,” the MLC believes appropriate terms of use should address potential misuse of information from the MLC’s database (rather than regulations).<sup>179</sup>

While the Office agrees that it will be important for the MLC to develop reasonable terms of use to address potential misuse of information in its database and appreciates the role that contractual remedies may play to deter abuse, the MMA directs the Office to issue regulations regarding “usage restrictions,” in addition to usability and interoperability of the database.<sup>180</sup> The Office is mindful of the risk of misuse. For example, bad actors could acquire and misrepresent information, or exploit personally

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<sup>177</sup> CISAC & BIEM Initial at 4.

<sup>178</sup> DLC Initial at 21.

<sup>179</sup> MLC Reply at 37–38.

<sup>180</sup> 17 U.S.C. 115(d)(3)(E)(vi).

identifiable information (“PII”) that must be publicly available under the statute (*e.g.*, copyright owner of the musical work (or share thereof), and the ownership percentage of that owner). At the same time, the Office recognizes that potential regulations and any terms of use issued by the MLC should not be overly broad or impose unnecessary restrictions upon good faith users.<sup>181</sup>

The Office seeks public input on any issues that should be considered relating to restrictions on usage of information in the MLC’s database, including whether regulatory language should address remedies for misuse (and if so, how and why), or otherwise provide a potential regulatory floor for the MLC’s terms of use. The Office invites parties to provide specific proposed regulatory language for the Office to consider and for others to comment upon.

**Dated:** April 15, 2020

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**Regan A. Smith,**

*General Counsel and  
Associate Register of Copyrights*

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<sup>181</sup> See Conf. Rep. at 6 (“Music metadata has more often been seen as a competitive advantage for the party that controls the database, rather than as a resource for building an industry on. . .”).

